Supreme Court, U.S.
FILED
MAY 6 1993
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No. 92-1612

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

SOUTHERN PACIFIC TRANSPORTATION COMPANY AND ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY IN OPPOSITION

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May 6, 1993

LISTING PURSUANT TO RULE 29.1

Pursuant to Rule 29.1, the following corporations are subsidiaries (except wholly owned subsidiaries) of Union Pacific Corporation or of its indirect wholly-owned subsidiaries Union Pacific Railroad Company or Missouri Pacific Railroad Company:

Alameda Belt Line
The Alton & Southern Railray Company
Arkansas & Memphis Railway Bridge & Terminal Company
Automated Monitoring & Control International, Inc.
The Belt Railway Company of Chicago
Brownsville & Matamoros Bridge Company
Camas Prairie Railroad
Central California Traction Company
Denver Union Terminal Railway Company
Houston Belt & Terminal Railway Company
Kansas City Terminal Railway Company
Longview Switching Company
The Oakland Terminal Railway
The Ogden Union Railway & Depot Company
Portland Terminal Railway Company
Portland Traction Company
Southern Illinois & Missouri Bridge Co.
St. Joseph & Grand Island Railway Company
St. Joseph Terminal Railroad Company
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
Transportation Data Xchange, Inc.
TTX
Uinta Development Company
Wichita Union Terminal Railway Company

The following companies are parent companies of Union Pacific Railroad Company or Missouri Pacific Railroad Company:

Missouri Pacific Corporation
Union Pacific Holdings Corp.

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PRELIMINARY STATEMENT

Respondents Union Pacific Corporation ("UPC") and its subsidiaries Union Pacific Railroad Company ("UPRR") and Missouri Pacific Railroad Company ("MPRR")[1] submit this brief in opposition to the petition for a writ of certiorari.

This case is not appropriate for review by this Court. SP's[2] Petition rests on a supposed "departure from prior policy" by the Interstate Commerce Commission ("ICC") that in fact never occurred. The ICC consistently justified the particular actions challenged by SP as (a) necessary to place the trackage rights tenant (SP) in the same position as the landlord (UP) with respect to the costs associated with these railroads' joint use of the trackage rights lines, and thus (b) comporting fully with the goal of preserving competition which is one aspect of the ICC's "merger policy."

Moreover, while SP's claim is premised on a complaint that the overall level of compensation set by the ICC does not allow it to compete, its challenge to the ICC's compensation orders relates only to a single aspect of a multi-component compensation formula. SP thereby obscures the fact that in adopting and applying other aspects of its compensation formula, the ICC took actions — challenged by UP at the ICC and before the Court of Appeals — that had a far greater effect *in SP's favor* on the overall level of compensation than the ICC actions SP challenges here. SP completely fails to address whether the *overall* compensation terms diverged in any respect at all from the ICC's prior policies.

Finally, even if SP's characterization of this case were correct, SP's petition would not present an issue of sufficient importance to warrant review by this Court.

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[1] UPRR and MPRR are operated as a single railroad system, and are referred to collectively as "UP."

[2] Petitioners Southern Pacific Transportation Company and St. Louis Southwestern Railway Company are referred to collectively as "SP."

COUNTERSTATEMENT OF THE CASE

SP's Petition rests on a selective and misleading characterization of the agency and judicial review proceedings out of which this case arises.

A. The UP-MP-WP Merger

SP seeks review of a decision by the United States Court of Appeals for the District of Columbia Circuit denying review of five ICC orders establishing compensation terms to govern SP's use of trackage rights over certain UP lines that were granted to SP in 1982 in connection with the ICC's approval of the consolidation of UPRR, MPRR, and the Western Pacific Railroad Company in *Union Pacific Corp., Pacific Rail System, Inc., & Union Pacific R.R. — Control — Missouri Pacific Corp. & Missouri Pacific R.R.*, 366 I.C.C. 462 (1982), *aff'd in relevant part sub nom. Southern Pacific Transportation Co. v. United States*, 736 F.2d 709 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985) ("*UP-MP-WP*").[3] In approving the UP-MP-WP transaction, the ICC was exercising its plenary and exclusive authority over railroad consolidations. 49 U.S.C. § 11341(a). That role encompassed consideration of all factors relevant to the ICC's broad mandate to determine whether approval of the transaction "is consistent with the public interest." 49 U.S.C. § 11344(c). One such factor is the effect of the transaction on "competition among rail carriers in the affected region." 49 U.S.C. § 11344(b)(1)(E); *see also UP-MP-WP*, 366 I.C.C. at 501-02. In passing upon the consolidation,

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[3] The ICC established the compensation terms at issue in five published decisions in *St. Louis Southwestern Ry. — Trackage Rights Over Missouri Pacific R.R. — Kansas City to St. Louis*, 1 I.C.C.2d 776, Pet. App. 7a (1984) ("*Compensation I*"), 4 I.C.C.2d 668 (1987), Pet. App. 64a ("*Compensation II*"), 5 I.C.C.2d 525 (1989), Pet. App. 121a ("*Compensation III*"), 8 I.C.C.2d 80 (1984), Pet. App. 144a ("*Compensation IV*"), 8 I.C.C.2d 213 (1991), Pet. App. 189a ("*Compensation V*").

however, the ICC was not applying the federal antitrust laws, contrary to SP's suggestion (Pet. 4-5), nor was the ICC bound to adhere rigidly to the analytical principles applied by antitrust courts. *UP-MP-WP*, 366 I.C.C. at 502. To the contrary, the ICC's consistent policy has been to "reject the contention that antitrust considerations might assume controlling importance in railroad consolidations." *Id.* Instead, the ICC regards competition as "but one factor, albeit an important one, in determining the public interest." *Id.* at 503.

The ICC conditioned its approval of the UP-MP-WP transaction on a grant to SP and the Denver and Rio Grande Western Railroad Company ("DRGW"), another railroad that has since become part of SP's corporate family (Pet. 9 n.8), of rights to operate trains over lines of the combined UP-MP-WP system between Pueblo, Colorado, and St. Louis, Missouri. The ICC granted to DRGW trackage rights between Pueblo and Kansas City in order to establish an alternative to the new UP-MP-WP system for transcontinental freight traffic moving in the so-called "Central Corridor" between California and the Eastern United States. *UP-MP-WP*, 366 I.C.C. at 577; *Compensation I*, 1 I.C.C.2d at 778, Pet. App. 10a. These trackage rights connected DRGW's system with the major Eastern railroads serving Kansas City and thereby served to ensure "a continued competitive presence in the central corridor." *Id.* at 778, Pet. App. 10a.

"To further strengthen" this "central corridor alterative to UP," the ICC also granted trackage rights to SP over MPRR's lines between Kansas City and St. Louis (hereafter "the trackage rights lines") — the most valuable single segment in MPRR's entire system — thereby creating an efficient SP-DRGW-SP Central Corridor route all the way from the West Coast to St. Louis. *Id.* at 779, Pet. App. 12a; *see also* Pet. 7 & n.7. SP argued for this grant in part because the ability to operate over MPRR's first-class trackage would avoid the need for SP to spend upwards of

$100 million to rehabilitate its own line between Kansas City and St. Louis. *UP-MP-WP*, 366 I.C.C. at 586.

B. SP's Use of the Kansas City-St. Louis Trackage Rights

When it imposed these trackage rights conditions incident to its approval of the UP-MP-WP transaction, the ICC did not establish the specific compensation and other terms that would govern those rights. Rather, the ICC instructed the parties to attempt to reach agreement on compensation terms and retained jurisdiction to establish terms if the parties failed to agree.

UP and DRGW ultimately agreed on permanent compensation terms, but UP and SP were unable to reach agreement. UP and SP agreed that SP would be required to pay the share of maintenance and operating expenses attributable to SP's use of the trackage rights lines, but were unable to agree on the level of rent necessary to compensate UP for its substantial capital investment in the assets comprising the Kansas City-St. Louis line segment. In 1983, UP and SP petitioned the ICC to establish permanent compensation terms. The compensation proceedings at the ICC — which lasted over eight years and generated five published ICC decisions — centered on the question of rental.

The parties' inability to agree to permanent terms, however, did not delay SP's commencement of operations over the lines. Since January 1983, SP has been operating several trains per day using the trackage rights lines — accounting for approximately 25% of the total usage made of the lines. SP has been voluntarily paying a small amount as rent, but by agreement the rental will be retroactively adjusted with interest upon the final completion of judicial review in this case to reflect the compensation terms imposed by the ICC. *Compensation I*, 1 I.C.C.2d at 792, Pet. App. 34a-35a; *Compensation IV*, 8 I.C.C.2d at 101 n.34, Pet. App.

171a n.34. As of March 1, 1993, the rental payments that UP had received from SP totaled over $54 million less than the amount required by the terms imposed by the ICC.[4]

During the pendency of the ICC compensation proceedings, changes in "the competitive and operating environments of the railroads involved" fundamentally altered SP's need for the trackage rights to compete against UP in the Central Corridor. In 1988, SP and DRGW came under common control. Then, in 1990, SP acquired trackage rights over the Burlington Northern Railroad Company between Kansas City and Chicago, giving SP its own route between central California and connection with all major Eastern railroads at the preeminent Chicago rail hub. *Compensation IV*, 8 I.C.C.2d at 87-88 n.14, Pet. App. 154a n.14. The effect of these developments was to diminish, if not eliminate, SP's need for access to the trackage rights lines in order to compete in the transcontinental Central Corridor.

C. The ICC's Compensation Proceedings

1. The Goal of the Proceedings

The ICC's compensation proceedings did not present the choice between conflicting regulatory goals that SP's Petition suggests. Throughout the proceedings, the ICC adhered to its policy that SP should pay compensation for use of the trackage rights that would give SP and UP the same opportunity to compete using the trackage rights lines. Specifically, the ICC articulated as its guiding principle the goal of assuring that SP would be "put . . . in the same

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[4] In 1990, when the ICC's compensation formula had become sufficiently definite to allow calculation of the precise amount of rent owed by SP, MPRR initiated an action in United States District Court for the District of Nebraska to collect the amounts owing to UP under the ICC's orders. *Missouri Pacific R.R.* v. *Southern Pacific Transportation Co.*, No. CV90-0-383 (D. Neb., filed June 15, 1990). That action is being held in abeyance pending the completion of judicial review herein.

position as the owning carrier" with respect to the costs associated with the lines that both railroads would use, allowing "SP . . . to operate with a cost structure competitive to that of the UP on these lines." *Compensation I*, 1 I.C.C.2d at 786, 802, Pet. App. 24a, 50a-51a. By bearing its share of UP's ownership costs in the form of rent, SP would have the same opportunity as UP to use the trackage rights lines to compete for Central Corridor traffic, and neither railroad would be subsidizing the other's operations. This goal of "parity" is the same goal that SP has contended the ICC was required to follow in this case. Pet. 10-11, 12.

Contrary to SP's contention, moreover, this goal was in no respect inconsistent with the goal of "revenue adequacy." Pet. 11. Rather, from the outset the ICC recognized that one of the economic costs borne by UP and every other railroad that owns trackage and other assets is a return based on the railroad-industry cost of capital applied to the current value of the asset in question. Such capital costs must be covered to prevent disinvestment in the landlord's operations. Incorporating this very real landlord cost into the trackage rights compensation terms to be paid by SP was thus regarded by the ICC as necessary for two reasons: *first*, to place UP and SP on equal footing with respect to line costs, thus preventing the trackage rights from effecting a "cross subsidy from the landlord or its customers," *Compensation II*, 4 I.C.C.2d at 683, Pet. App. 86a (quotation omitted); and *second*, to fulfill the congressional policy of "'allowing rail carriers to earn adequate revenues,'" *id.* at 682, Pet. App. 85a (quoting 49 U.S.C. § 10101a(3)).

The supposed "tension" between these goals (Pet. 10) is entirely of SP's own fabrication. The purported inconsistency arose only when SP shifted from arguing that the ICC intended to provide it with a fair "competitive opportunity" — the aim the ICC did accomplish — to contending that the ICC was required to guarantee SP's *success* in competing with UP. Such a guarantee of outcomes, however, was never a

part of the ICC's merger policy. *See Compensation IV*, 8 I.C.C.2d at 85 & n.13, Pet. App. 151a & n.13. Although the ICC wished to enable SP to provide shippers with an alternative to UP's Central Corridor route, it made no attempt to guarantee that shippers would find SP's overall package of rates and service equally or more attractive than that offered by UP, or even that SP would necessarily choose to operate the trackage rights. *Id.* SP's success in winning shippers' business would inevitably depend on countless factors having nothing to do with compensation for the small portion of SP's overall transcontinental route represented by the trackage rights lines — including the quality of services SP offered, the efficiency of its operations in running trains carrying the transcontinental traffic as to which it would be competing against UP (both over its own and the trackage rights lines), and the ownership costs associated with SP's own lines.

In light of the ICC's more limited goal of creating a level playing field, it is not surprising that the ICC repeatedly rejected SP's efforts to have the ICC consider evidence of the competitive *outcomes* resulting from SP's use of the trackage rights lines. That evidence was simply not relevant to whether compensation terms had properly placed SP and UP "in the same position" with respect to line costs. *Compensation III*, 5 I.C.C.2d at 538-39, Pet. App. 139a-140a; *Compensation IV*, 8 I.C.C.2d at 95, Pet. App. 164a; *Compensation V*, 8 I.C.C.2d at 217 & n.12, 218 & n.16, Pet. App. 194a & n.12, 196a & n.16.

2. The Issues Before the ICC

Nor, as SP suggests (at Pet. 9-11), did the compensation proceedings focus on the single "issue" of the appropriate rate of return used to calculate SP's rental obligations. Establishing the appropriate level of SP's rental payments required the resolution of three equally-indispensable issues, not one. The ICC had to develop (1) a valuation of the trackage rights lines, (2) a rate of return to be applied to the

valuation base, and (3) a formula for allocating the resulting overall capital costs between the railroads using the lines. Each of these basic methodological elements required the ICC to resolve numerous subsidiary but often highly controversial factual issues. Although SP now complains that the ICC erred in its choice of the rate of return, the ICC also rejected arguments made by UP which challenged (a) the ICC's determination of the value of the trackage rights lines, addressed immediately below, and (b) the allocation of total capital costs between UP and SP.[5]

a. Valuation of the Trackage Rights Lines

Although there is no mention of it in SP's Petition, the valuation of the trackage rights lines was the most extensively disputed single issue in the compensation proceedings. UP's position before the ICC was that it should receive rent computed using a rate of return equal to the railroad-industry cost of capital and a valuation base derived from the reproduction cost new less depreciation ("RCNLD") of the trackage rights lines. UP submitted evidence establishing that rental payments should reflect the landlord's true economic costs, and that rent at that level was essential to place the landlord and tenant on equal footing with respect to the lines' costs. Had UP's position been adopted by the ICC, it would have mandated overall rent several times higher than that which SP now challenges. SP, on the other hand, favored valuing the lines based on their much lower ledger value — but the ICC ultimately set an even *lower* value.

In *Compensation I*, the ICC rejected both the RCNLD and ledger value approaches in favor of a purchase-price-

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[5] UP argued that total capital costs should be allocated to UP and SP on a 50-50 basis, since SP was granted the unlimited right to use UP's property in common with UP. The ICC rejected this approach in favor of a "rolling-average usage" allocation method favored by SP. *Compensation I*, 1 I.C.C.2d at 790, Pet. App. 30a-31a; *Compensation II*, 4 I.C.C.2d at 687, Pet. App. 92a-93a.

based method — referred to as the "capitalized-earnings approach" — that calculated the value of the lines based on a highly-complex allocation of the price paid by UP in 1979 when it acquired Missouri Pacific Corporation ("MPC"). (One part of MPC was the MPRR system, which in turn included the trackage rights lines.) That allocation involved, *inter alia*, estimation of an "earnings multiplier" for MPC's railroad earnings, and estimation of the earnings attributable to the trackage rights lines, which comprised only a physically small but strategically vital part of the MPRR system. *Compensation I*, 1 I.C.C.2d at 787-90, 801-02, Pet. App. 25a-31a, 50a-51a.

Developing the value of the lines in this manner consumed the better part of six years and three ICC decisions. Following the ICC's adoption of the capitalized earnings approach, UP expressly preserved for appeal its position that the basic methodological choice was unsound, and that an RCNLD valuation — coupled with a rate of return based on the cost of capital — was necessary to ensure that the tenant paid its fair share of the landlord's costs. *See Compensation II*, 4 I.C.C.2d at 672 n.4, Pet. App. 70a n.4. The ICC's application of the capitalized earnings approach had resulted in one revision after another in the ICC's valuation of the trackage rights lines, virtually every one of which was made in SP's favor and over UP's objections. The end result of the ICC's deliberations was a valuation approximately one-sixth of the RCNLD value for which UP had argued, *and below even the ledger value for which SP had initially argued*. *Compare Compensation IV*, 8 I.C.C.2d at 82 n.6, Pet. App. 147a n.6, *with Compensation I*, 1 I.C.C.2d at 800, Pet. App. 47a.

b. Rate of Return

In its choice of the railroad-industry cost of capital as the rate of return, by contrast, the ICC consistently adhered to its principle of placing the landlord and tenant in positions of

parity with respect to line costs. The ICC explained that it was adopting the railroad-industry cost of capital because rent based on that rate of return was necessary to ensure "that the renting carrier is not subsidized by the owning road." *Compensation II*, 4 I.C.C.2d at 682, Pet. App. 86a.

The ICC adhered to this view when it rejected SP's proposal, made for the first time in 1988, that the rate of return be based on UP's own "floating" rate of return.[6] SP argued, as it did before the Court of Appeals and does again here, that use of the cost of capital would place SP in an "inferior position" vis-à-vis UP, allegedly breaching the principle of "competitive equality." *Compensation III*, 5 I.C.C.2d at 534, 535, Pet. App. 133a, 135a. The ICC expressly disagreed with SP's position, and again explained that the rate of return it was adopting would produce a sharing of costs between UP and SP that "places the parties on identical and competitive footing *and* ensures continued joint provision of service and adequate reinvestment." *Id.* at 530, Pet. App. 127a-128a (emphasis added).[7] Allowing SP to pay rent based on any rate of return less than the railroad-industry cost of capital would "force UP to subsidize its competitor SP." *Id.* at 536, Pet. App. 135a. The ICC further explained that SP's "floating rate" proposal did not "address the fundamental problem of cross-subsidization." *Id.* at 538, Pet. App. 139a.

In *Compensation V*, the ICC rejected yet again SP's "floating rate" of return proposal (advanced in conjunction with SP's same arguments about its supposed competitive

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[6] SP had initially argued for rent based on a 4% rate of return, a rate SP chose because it had been used in a 1904 agreement between the railroads. *Compensation I*, 1 I.C.C.2d at 799, Pet. App. 46a.

[7] The ICC reiterated the same point in its summary of the prior compensation proceedings in *Compensation IV*, 8 I.C.C.2d at 96-97, Pet. App. 166a, a decision that was otherwise devoted to clarification of various aspects of the ICC's compensation formula not pertinent here.

disadvantage). 8 I.C.C.2d at 215-18, Pet. App. 192a-196a. The ICC stressed: "All of [SP's] arguments have been made before, have been considered before, and have been rejected before." *Id.* at 217, Pet. App. 194a.

In both *Compensation III* and *Compensation V* the ICC also rejected the precise claim that SP now rehashes before this Court — namely, that the ICC's use of the cost of capital marked a reversal of the ICC's prior decisions in the case and departed from the policy of "competition" underlying the ICC's imposition of the trackage rights in the *UP-MP-WP* case. *See Compensation III*, 5 I.C.C.2d at 537-38, Pet. App. 138a-139a; *Compensation V*, 8 I.C.C.2d at 215-18, Pet. App. 192a-196a.

D. The Proceedings in the Court of Appeals

Both UP and SP filed petitions for review of the ICC's compensation orders in the D.C. Circuit, which the Court of Appeals consolidated in Docket No. 88-1186. UP and SP each challenged aspects of the ICC's compensation orders and defended other aspects of those orders. As pertinent here, SP contended that the ICC had erred in rejecting SP's proposed "floating" rate of return approach. UP argued that the ICC erred in rejecting UP's proposed RCNLD approach to valuation, which UP again explained was compelled by the same policy of parity that the ICC had followed in adopting the railroad-industry cost of capital as the rate of return — namely, to ensure that the landlord and tenant shared equally in the true economic costs associated with the trackage rights lines. D.C. Cir. No. 88-1186, Brief of Petitioners-Intervenors Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company at 33-34 (April 10, 1992). UP also argued that the ICC had erred in its approach to allocating total capital costs between the users of the lines and in applying the capitalized earnings approach to determine the valuation base.

After full briefing and oral argument, the D.C. Circuit rejected both parties' petitions for review in an unpublished Memorandum Order, finding all aspects of the ICC's orders to be supported by substantial evidence on the record. While the Court of Appeals noted that the approaches advocated by both UP and SP before the ICC might have had some merit, it concluded that the ICC had acted within its discretion in choosing a different course. Slip Op. at 2, Pet. App. 3a. The court emphasized that the ICC had "considered vast amounts of technical evidence, reevaluating and reformulating its decisions in light of the objections of the petitioners and the production of new evidence." *Id.*

SP's petition for rehearing and suggestion for rehearing *en banc* advanced the same issues that SP repeats yet again in this Petition. Those requests were denied by the D.C. Circuit without a request for a response to SP's arguments. This Petition followed.

REASONS FOR DENYING THE WRIT

The Petition presents no valid basis for reviewing the Court of Appeals' order denying review of the ICC's five compensation orders.

I. THE COURT BELOW PROPERLY DID NOT APPLY *STATE FARM* TO THIS CASE

SP's Petition asks this Court to "clarify the application and requirements of" *Motor Vehicles Manufacturers Association* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). Pet. 23. *State Farm* held that an agency must explain its departure from its established policy and precedents. 463 U.S. at 51, 56-57. The premise of SP's request is its claim that the "ICC departed from its merger policy when it set compensation" and "neither acknowledged nor explained the abandonment." Pet. i, 16 (emphasis

omitted). Contrary to SP's assertions, however, the ICC consistently adhered to its merger policy in establishing compensation terms to govern the trackage rights granted to SP in *UP-MP-WP*. As a result, the facts of this case simply do not raise the question SP presents for this Court's review. The Court of Appeals properly did not apply *State Farm* because the predicate for its application did not exist in this case.

A.

The core defect in SP's Petition is its failure, now for the fifth time in this case,[8] to come to grips with the consistency between the ICC's adoption of the railroad-industry cost of capital as the rate of return used to calculate rent and the ICC's "pro-competitive" policy of placing the landlord and tenant in the same position with respect to the costs of using the trackage rights lines, which even SP concedes comported with the ICC's "policy" in the *UP-MP-WP* merger case of giving SP the opportunity to provide a competitive alternative to UP. *See* Pet. 12.

The ICC's consistent adherence to this policy is demonstrated compellingly by the ICC's repeated articulations of the reasoning behind its choice of the cost of capital — *i.e.*, that it "places the parties on identical and competitive footing" (*Compensation III*, 5 I.C.C.2d at 530, Pet. App. 127a) and avoids having "UP . . . subsidize its competitor SP" (*id.* at 536, Pet. App. 135a).

The same conclusion follows inevitably from the ICC's finding that the railroad-industry cost of capital represented a

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[8] SP's identical contention that use of the cost of capital placed it at a competitive disadvantage vis-à-vis UP and thus marked a departure from the ICC's merger policy was rejected by the ICC in *Compensation III* and *Compensation V* and by the Court of Appeals when it denied SP's petition for review and SP's petition for rehearing and suggestion of rehearing *en banc*.

true economic cost borne by the owning railroad. *E.g.*, *id.* at 529-30, Pet. App. 127a. UP explained to the Court of Appeals that voluminous evidence had been presented to the ICC — including by SP's own expert witnesses — establishing that the railroad cost of capital was a real economic cost borne by UP with respect to its ownership of the trackage rights lines. SP itself was compelled to concede this point in its Reply Brief. D.C. Cir. No. 88-1186, Reply Brief of Petitioners Southern Pacific Transportation Company and St. Louis Southwestern Railway Company at 13-14 (June 10, 1992). Although SP may believe that it should not have to share in this cost unless UP fully passes the cost on in the rates it charges to shippers,[9] SP never identified any reason why the ICC acted unreasonably in concluding that *all* costs borne by UP must be shared by SP if the railroads using the trackage rights lines are to have identical cost structures and so compete on an "identical competitive footing."

SP's effort to draw a supposed distinction between policies of "preventing any substantial lessening of competition and merely preventing monopoly pricing" (Pet. 15) does not overcome this fundamental defect in SP's claim that *State Farm* is applicable to this case. In fact, the ICC consistently adhered to the very same policy that SP says is the appropriate one — namely, the "pro-competitive goal" of placing the "'tenant [SP/DRGW] in precisely the position of the owning road [UP].'" Pet. 12 (emphasis omitted) (quoting *Compensation I*, 1 I.C.C.2d at 786, Pet. App. 24a). That this also served to prevent "monopoly pricing" does not

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[9] UP explained to the Court of Appeals, however, that there was ample evidence in the record for the ICC to conclude that UP's actual rate of return for the trackage rights lines was at least equal to the railroad-industry cost of capital. D.C. Cir. No. 88-1186, Intervenors' Brief of Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company ("UP's Intervenors' Brief") at 6 n.6 (May 27, 1992).

introduce any inconsistency.[10] Thus, this case involves no "change of policy" (Pet. 15) as to which this Court might clarify the application of *State Farm*.

Finally, SP attempts to make something of the Court of Appeals' comment to the effect that the ICC had not "fully explain[ed] why [UP and SP's] suggested approaches [to trackage rights compensation] were inferior to its own." Slip Op. at 2, Pet. App. 3a; *see* Pet. 16. SP contends that this failure to explain was inconsistent with the requirements of *State Farm*. Pet. 16. The crucial gap in SP's reasoning, however, remains the same, since there still exists no "departure from prior policy" that the ICC was under any obligation to explain.

It is apparent here, as it was before the Court of Appeals, that SP's real complaint with the ICC's compensation orders is that the ICC did not manipulate the terms of trackage rights compensation so as to guarantee that SP would *succeed* in competing against UP using the trackage rights lines. The ICC properly recognized that such a guarantee would be totally foreign to the ICC's goal of establishing SP's access to the trackage rights lines on a level playing field with the owning railroad. SP's contrary view has been repeatedly rejected by the ICC and the Court of Appeals, and presents no occasion for this Court's review.

B.

An equally fatal flaw in SP's position before this Court is SP's effort to assail in isolation one aspect of the compensation formula adopted by the ICC. The premise of

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[10] The ICC never said, as SP claims, that the trackage rights had been intended "*only*" to enable SP to offer "a competitive alternative 'if UP were to engage in *monopolistic* pricing practices.'" Pet. 21 (quoting *Compensation IV*, 8 I.C.C.2d at 86, Pet. App. 152a) (both emphases SP's). The word "only" is SP's word, not the ICC's.

SP's sole critique of the ICC's orders is that the ICC departed from its merger policy when it imposed compensation terms that had the effect of creating "a competitive handicap for SP." Pet. 23. If any such handicap really exists, of course, it must be the result of the *overall* compensation terms imposed by the ICC, since that is the basis for the payments SP is required to make for its use of the trackage rights lines. As UP demonstrated to the Court of Appeals, the overall rent "is the product of three equally-indispensable elements: the rate of return, the valuation base, and the allocation share." UP's Intervenors' Brief at 3. Yet SP's entire focus, both in this Petition and before the Court of Appeals, has been on only a single element of this formula — use of the cost of capital as the rate of return. Pet. 22-23.

As a result, SP fails here, as it did before the Court of Appeals, even to *address* whether the overall level of the ICC-imposed compensation was reasonable under the standard of *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944). Nor has SP spoken to the central question raised by SP's own effort to implicate *State Farm* — *i.e.*, whether the overall level of compensation ultimately imposed by the ICC has deviated from the ICC's policy of providing SP with the opportunity to compete on an equal basis with UP for Central Corridor transcontinental traffic.

This failure is particularly crippling where, as here, UP demonstrated to the Court of Appeals that numerous important steps taken by the ICC in developing the other elements of the rental calculus had substantially greater effects on the overall level of compensation, *in SP's favor*, than the single issue on which SP has focused its attention.[11]

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[11] SP concedes as much when it points out that UP argued before the Court of Appeals that the ICC severely undervalued the trackage rights lines. Pet. 15 n.14. SP's suggestion that UP was thereby trying to create "an even greater cost disadvantage to SP" acknowledges (in a backhanded way) that the ICC could have imposed on SP considerably higher total (continued...)

Moreover, UP established that its rejected RCNLD valuation approach, which would have dramatically increased overall compensation regardless of which approach was adopted for rate of return, was the *only* method consistent with the goal now purportedly championed by SP of placing the landlord and tenant on equal footing. SP has totally failed to show that the Commission's failure to set an even lower rental rate amounted to an "abandonment" of the Commission's merger policy.

II. THE ISSUE PRESENTED IN THE PETITION IS NOT IMPORTANT ENOUGH TO WARRANT REVIEW BY THIS COURT

Even as SP has framed the issue, moreover, the case presents no important matter of policy that warrants discretionary review by this Court. The decision of the Court of Appeals upholding the ICC's orders in all respects presents no conflict with any decision of another court of appeals or of this Court. Nor is there any important unsettled question of federal law that should be resolved by this Court. At most, this case represents the application of well-established principles of judicial review to the unique and highly particularized facts of this decade-long compensation proceeding in which the ICC "considered vast amounts of technical evidence, reevaluating and reformulating its decisions in light of the objections of the petitioners and the production of new evidence." Slip Op. at 2, Pet. App. 3a.

SP's own request for relief underscores the lack of general public importance of this case. SP urges clarification by this Court of the "application and requirements" of *State Farm* (Pet. 23). Such a clarification, even if it were called for here, would at best add marginally to the jurisprudence in

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[11](...continued)
rental even if it had entirely acceded to SP's approach to the rate of return.

a well-settled field of the law. More likely, it would have no meaningful impact beyond the parties to this case. How much money SP is required to pay UP for its use of the trackage rights lines is not an issue of wide public importance. And any public policy importance that SP's ability to compete for Central Corridor traffic using the trackage rights lines might once have had substantially disappeared when SP acquired its own route for this traffic that does not require it to use the trackage rights lines (*see* page 5 *supra*). At most, therefore, this Court's further review of the ICC's compensation orders would accomplish a revision in the amount of money SP is required to pay UP when this case is over, hardly a matter demanding the attention of this Court.

Moreover, despite SP's effort to dress up the mundane question purportedly presented by this Petition — *i.e.*, the application of *State Farm* to the "ICC's implementation of a condition" — as involving a "problem" of "general" application (Pet. 18) which is "essential to the proper administration of the rail merger provisions of the Interstate Commerce Act" (Pet. 17), that question has no such policy importance. SP has not pointed to any uncertainty concerning the proper application of *State Farm* in cases where (unlike here) an agency has actually departed from settled policy. Nor has SP identified even a single ICC merger case — present or future — that would be affected by this Court's involvement in the present dispute.

The inappropriateness of a grant of SP's petition is emphasized by the plain fact that SP's Petition to this Court is merely the last step in SP's strategy of drawing out for as long as possible the ICC compensation proceedings and judicial review thereof, in order to forestall paying UP the tens of millions of dollars it owes under the ICC's orders for its use of UP's lines to date. Those payments will become payable as soon as judicial review is completed, which will occur when this Court denies SP's Petition.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

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May 6, 1993